Aug 29, 2001

(6)

Supreme Court, U.S.
FILED
AUG 29 2001
OFFICE OF THE CLERK

No. 00-1614

IN THE
Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner,

v.

ABNER MORGAN, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully submit this brief as *amici curiae*.[1] A letter of consent from all parties has been filed with the Court. The brief urges this Court to reverse the decision below, and thus supports the position of the petitioner, National Railroad Passenger Corporation.

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[1] Counsel for *amici curiae* authored the brief in its entirety. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC" or the "Council") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 360 of the nation's largest private sector corporations, collectively employing over 17 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of nearly three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's and many of the Chamber's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, and other equal employment statutes and regulations. As employers, and as potential defendants to claims asserted under these laws, members of EEAC and the Chamber have a substantial interest in the issue presented in this case, *i.e.*, whether an individual who declined to file a charge within Title VII's limitations period on discrete allegedly discriminatory

employment actions subsequently may revive them simply by arguing that they are "sufficiently related" to allegedly discriminatory acts that fall within the applicable limitations period.

EEAC and the Chamber seek to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of this Court relevant matters that the parties have not raised. Because of their experience in these matters, EEAC and the Chamber are well situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Abner Morgan, Jr., an African-American male, worked for the National Railroad Passenger Corporation, dba Amtrak ("Amtrak"), from August 1990 until his termination in March 1995. Pet. App. 7a-12a. During his employment, Morgan received several disciplinary actions, including written and verbal counselings and suspensions from work without pay, for violating work rules and absenteeism. *Id.* at 6a-12a. Morgan claims that he requested and was denied career opportunities at various times while working for Amtrak. *Id.* He was terminated by Amtrak in 1995 for violating a work rule. *Id.* at 11a-12a.

Although Morgan filed a number of internal equal employment opportunity (EEO) complaints during the five years he worked at Amtrak, he did not file a charge with the Equal Employment Opportunity Commission (EEOC) until February 27, 1995, shortly prior to his termination. *Id.* at 13a. In his EEOC charge, Morgan alleged that he was subjected to race discrimination and retaliation, and endured a racially hostile working environment, in violation of Title VII during the entire five years he worked at Amtrak. *Id.* at 6a. Morgan

thus attempted to combine events that occurred outside Title VII's limitations period, in this case 300 days prior to the filing of his EEOC charge, with more recent events as a continuing violation in order to avoid dismissal of his older claims as time-barred. *Id.*

The U.S. District Court for the Northern District of California granted partial summary judgment in favor of Amtrak on the older claims. The district court ruled that conduct that had occurred more than 300 days from the date of the charge was time-barred. *Id.* at 13a. The district court allowed Morgan's timely claims to proceed to trial and a jury returned a verdict in favor of Amtrak. *Id.*

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed the partial summary judgment decision. It interpreted the continuing violation theory to allow untimely claims to proceed if the "acts during the [limitations] period involve the same type of discrimination as those committed before the period." *Id.* at 17a (internal quotation and citation omitted). This standard asks only "whether there is a common type of discrimination, such as [racial] harassment, or if there is a common kind of employment action, such as repeated denial of a promotion." *Id.* (internal quotation and citation omitted). Applying its version of the continuing violation theory to Morgan's claims, the Ninth Circuit concluded that the pre-limitations conduct was "closely enough related to" the events occurring within the limitations period, and thus, properly the subject of Morgan's suit. *Id.* at 18a-20a.

Amtrak filed a petition with this Court for a writ of certiorari on the issue of whether a plaintiff who knowingly has allowed the statute of limitations to expire on alleged violations of federal anti-discrimination laws nevertheless may resurrect such claims if they are "sufficiently related" to incidents within the limitations period. The Court granted the petition.

SUMMARY OF ARGUMENT

Both the language of Title VII of the Civil Rights Act of 1964 ("Title VII") and this Court's repeated refusal to revive stale claims support limiting the continuing violation theory to situations in which an individual could not reasonably have known within the statutory time-period that he should assert his rights under Title VII. That law requires an aggrieved individual to file an administrative charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 or 300 days of the allegedly discriminatory event. 42 U.S.C. § 2000e-5(e). This Court consistently has interpreted this statutory time-limit strictly to require a present violation. The balance that this Court's decisions strike between remedying workplace discrimination and avoiding stale claims effectively precludes the Ninth Circuit's view that the existence of a present violation alone is enough to treat stale claims as part of a continuing violation merely because they allege the same type of discrimination.

This Court should limit the continuing violation theory to apply only to claims on which an individual reasonably could not be expected to sue before the limitations period expired. Conduct should be part of a continuing violation only if an individual needs to assess it in light of later conduct in order to determine whether a violation of his rights under Title VII has occurred. In contrast, discrete employment actions are actionable on an individual basis, and thus not part of a continuing violation.

Allowing the Ninth Circuit's decision to stand would severely prejudice employers by limiting their ability to defend stale employment actions and would thwart Title VII's goal of avoiding discrimination. Allowing an individual to file a discrimination charge more than 300 days after a discrete, allegedly discriminatory, act occurred conflicts with the EEOC's recordkeeping requirements under Title VII and places an undue burden on an employer to maintain the

records necessary to defend its past actions. Title VII's goal of avoiding discrimination, the same concern that led this Court to recognize an affirmative defense to sexual harassment claims under certain circumstances, also supports holding a plaintiff's actions to a "reasonable person" standard to determine when conduct is part of a continuing violation.

ARGUMENT

ALLEGEDLY DISCRIMINATORY CONDUCT OCCURRING OUTSIDE OF TITLE VII'S LIMITATIONS PERIOD MAY BE ACTIONABLE AS PART OF A "CONTINUING VIOLATION" ONLY IF EXPECTING AN INDIVIDUAL TO SUE ON IT BEFORE THE LIMITATIONS PERIOD EXPIRED WOULD HAVE BEEN UNREASONABLE

I. THE LANGUAGE OF TITLE VII, TOGETHER WITH THIS COURT'S CONSISTENT REFUSAL TO REVIVE STALE CLAIMS, SUPPORTS A NARROW APPLICATION OF THE CONTINUING VIOLATION THEORY LIMITED TO SITUATIONS IN WHICH AN INDIVIDUAL REASONABLY COULD NOT HAVE KNOWN WITHIN THE STATUTORILY ALLOTTED TIME-PERIOD THAT HE HAD AN ACTIONABLE CLAIM UNDER TITLE VII

A. Title VII Requires an Aggrieved Individual To File an Administrative Charge Within 180 or 300 Days of the Allegedly Discriminatory Event

Title VII "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). One of these prerequisites is that aggrieved individuals must file an administrative charge of discrimination with the Equal Employment Opportunity

Commission (EEOC) within one hundred and eighty days after the alleged discriminatory event. 42 U.S.C. § 2000e-5(e).[2] Congress specifically decided that the time limitations would start with the date of the "alleged unlawful employment practice." *Id.*; *Delaware State Coll. v. Ricks*, 449 U.S. 250, 259 (1980). Title VII makes only one exception to this requirement. Where the aggrieved individual has filed a discrimination charge with a state or local enforcement agency with authority to grant or seek relief, he or she has "three hundred days after the alleged unlawful employment practice occurred" to file an EEOC charge. 42 U.S.C. § 2000e-5(e). No other exceptions extend the length of Title VII's limitations period.

Congress deliberately restricted the rights of individuals to raise Title VII claims when it set the length of the limitations period. In a related context, this Court cautioned courts against disregarding this restriction:

> By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination . . . [I]n a statutory scheme in which Congress carefully prescribed a series of deadlines measured by numbers of days—rather than months or years—we may not simply interject an additional . . . period into the procedural scheme. We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.

Mohasco Corp. v. Silver, 447 U.S. 807, 825-26 (1980) (footnote omitted); *see also International Union of Electrical,*

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[2] The second prerequisite is that an individual must file suit within ninety days of receiving a notice of the right to sue from the EEOC. 42 U.S.C. § 2000e-5(f).

Radio and Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229, 240 (1976) ("Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisites 'with precision,' Congress did not leave to courts the decision as to which delays might or might not be 'slight'") (citation omitted).[3]

This Court concluded in *Mohasco* that in choosing the length of Title VII's limitations period, Congress intentionally risked leaving some victims of discrimination without a remedy in order to further its goal of precluding stale claims, stating: "it seems clear that the 90-day provision to some must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." 447 U.S. at 820. In light of Congress's decision, this Court advised: "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 826. Those words of advice apply with equal force to this case.

B. This Court Consistently Has Applied the Continuing Violation Theory Narrowly

This Court has ruled before that prior conduct is not actionable as part of a continuing violation unless a present wrong exists within Title VII's limitations period. *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). The converse,

[3] The 1972 amendments to Title VII enlarged the limitations period to 180 days. (codified as amended at 42 U.S.C. § 2000e-5(e)).

however, is not true. The occurrence of an allegedly discriminatory event within Title VII's limitations period does not revive all claims alleging the same type of discrimination that arose before the limitations period, as the Ninth Circuit held below.

1. A Continuing Violation Requires a Present Violation

In keeping with the plain language of Title VII, this Court applied the continuing violation theory narrowly in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), to require a "*present violation*" of Title VII within the limitations period. *Id.* at 558 (emphasis added). In *Evans*, a flight attendant was forced to resign for violating a policy that later was found to be discriminatory. When she was rehired four years later, her seniority date did not reflect her prior service with the company. Evans did not file a timely administrative charge over her resignation, but tried to revive this claim after her rehire by alleging that the company's seniority system was part of a continuing violation that "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." *Id.* at 557.

This Court rejected Evans' argument because no current violation of Title VII existed at the time of her charge. The seniority system by itself did not treat similarly situated males and females differently on the basis of sex, and thus did not carry the prior discriminatory act—her forced resignation—forward into the present as a continuing violation. The Court instructed: "the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists." *Id.* at 558. [4]

[4] *Compare Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (applying continuing violation theory where "[e]ach week's paycheck that delivers

This Court again refused to allow an individual's continued employment to expand the limitations period to cover an untimely discrimination claim in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). In that case, the Court held the college's decision to deny Ricks tenure was the discriminatory act that marked the beginning of the limitations period, even though he did not feel one of the effects of the decision until his termination. Again, this Court reminded litigants that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Ricks*, 449 U.S. at 257 (citing *Evans*). Likewise, this Court ruled in *Chardon v. Fernandez*, 454 U.S. 6 (1981), that the limitations period on plaintiff's claim began when he received notice of his impending termination, not on the actual date of his termination, even though he continued to work up to his last day.

2. The Balance This Court's Decisions Strike Between Providing Remedies for Employment Discrimination and Avoiding Stale Claims Effectively Precludes Allowing the Mere Existence of a Present Violation To Be Part of a Continuing Violation

The Court's prior decisions effectively preclude expanding Title VII's limitations period by allowing a present violation to revive stale claims as part of a continuing violation simply because they allege the same type of discrimination. In fact, this Court has said that the purpose of statutes of limitations is to avoid precisely the prejudice to employers that results from defending stale claims.

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less to a black than to a similarly situated white is a wrong actionable under Title VII ... ").

> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965). A narrow application of the continuing violation theory encourages the prompt filing of claims, which in turn is likely to increase the accuracy of the determination as to whether unlawful discrimination occurred.

The decisions limiting the application of the continuing violation theory thus reflect this Court's view that the interest of an individual who fails to undertake the "minimal" step of filing a charge to preserve his Title VII claim must give way to the interest of avoiding stale claims. *See Ricks*, 449 U.S. at 256-57 ("[t]he limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past"); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones").

Barring stale claims helps effectuate the employer's civil right to finality. The Court described the practical consequences of an individual's failure to file a timely charge in *Evans* as follows:

> United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

431 U.S. at 558.

C. This Court Should Limit Actionable Conduct Under a Continuing Violation Theory to Claims on Which an Individual Reasonably Could Not Be Expected To Sue Before the Limitations Period Expired

1. The Continuing Violation Theory Should Apply Only To Conduct That Must Be Assessed in Light of Later Conduct Before an Individual Reasonably Could Have Known Whether To Assert Rights Under Title VII

Under certain limited circumstances, the continuing violation theory may allow an individual to challenge conduct occurring outside of Title VII's limitations period as part of a timely claim. In so doing, however, courts must still maintain a proper balance with the interest in avoiding stale claims.

The Seventh Circuit established an appropriate test in *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164 (7th Cir. 1996), limiting the use of the continuing violation theory to situations in which the individual reasonably could not have perceived that the conduct was actionable within the limitations period. In *Galloway*, an employee who claimed that her co-worker had made repeated

derogatory and offensive comments to her of a sexual nature since 1987 did not file an administrative charge of sex discrimination with the EEOC until 1991. In allowing Galloway to challenge conduct that occurred more than 300 days before she filed her EEOC charge, the Seventh Circuit recognized that the particular nature of harassment claims makes the continuing violation theory applicable under certain circumstances: "Sexual harassment serious enough to constitute unlawful discrimination on grounds of sex is often a cumulative process rather than a one-time event. In its early stages it may not be diagnosable as sex discrimination, or may not cross the threshold that separates the nonactionable from the actionable." 78 F.3d at 1166 (citation omitted). For this reason, the court was willing to include pre-limitations conduct into a timely Title VII charge.

Nevertheless, the court appropriately reserved continuing violations to situations where "it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct," since a plaintiff should not benefit from her own inaction. *Id.* at 1167. "[I]n such a case, while she can still sue provided that the last act of harassment occurred within the statute of limitations, she cannot reach back and base her suit also on conduct that occurred outside the statute of limitations; *for she had no excuse for waiting that long*." *Id.* (emphasis added) (citations omitted).

The Fifth Circuit also has used the Seventh Circuit's standard to limit the use of the continuing violation theory in *Webb v. Cardiothoracic Surgery Associates*, 139 F.3d 532 (5th Cir. 1998). In that case, a plaintiff who knew she was experiencing unlawful harassment, but nevertheless failed to file a timely charge, could not include conduct that occurred outside of Title VII's limitations period in her lawsuit. *Id.* at

537-38.[5] This approach thus furthers Title VII's objective to promote the prompt filing and resolution of discrimination charges while recognizing that some harassing conduct may not alert an individual to the presence of a harassment claim until after the limitations period on some of the incidents has expired.

2. In Contrast, Discrete Employment Actions Are Actionable Individually and Thus Not Part of a Continuing Violation

The key question for Title VII's limitations period is "what event, in fairness and logic, should have alerted the average lay person to act to protect his rights." *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1560-61 (5th Cir. 1985) (citation omitted). The continuing violation theory maintains this focus by asking when an individual reasonably could be expected to know that his rights are being violated. According to the Tenth Circuit:

> The continuing violation doctrine "is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated." Thus, a continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence

[5] The Fifth Circuit has its own test to determine when to use the continuing violation theory to revive otherwise time-barred claims. That test asks whether the alleged acts involve the same protected basis and type of employment action, if they are recurring, and if they have the degree of "permanency" to trigger an individual's awareness of and duty to assert his rights. *Berry v. Board of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983). As the *Webb* decision shows, however, the case law seems to focus on the last factor as determinative of when otherwise untimely conduct is part of a continuing violation, essentially reducing the test to the Seventh Circuit's *Galloway* standard.

> would have known, she was being discriminated against at the time the earlier events occurred.

Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1311 (10th Cir. 1999) (citation omitted).

The rationale for applying the continuing violation theory, however, is absent where discrete employment actions, like being denied a promotion or receiving a disciplinary action, are involved. In those situations, the adverse employment action happens at a specific time and is sufficient to alert the aggrieved individual that his rights may have been violated.

For this reason, several circuits correctly have refused to apply the continuing violation theory to discrete acts. In *Gipson v. KAS Snacktime Co.*, 83 F.3d 225 (8th Cir. 1996), for example, the Eighth Circuit rejected plaintiff's characterization of his denial of a pay raise and alleged discriminatory demotion and reassignment as part of a continuing violation. Instead, these acts were time-barred under the state's anti-discrimination statute. The court explained: "a discrete, adverse employment action, such as a discharge, layoff, or failure to promote, constitutes a completed act at the time it occurred. The time for filing an administrative charge or commencing a lawsuit runs from the date of such a discriminatory act, even if its effects on the injured employee are long-lasting." *Id.* at 229 (internal quotation and citations omitted); *see also High v. University of Minnesota*, 236 F.3d 909 (8th Cir. 2000).

Likewise, the court held that repeated denials of promotions were discrete employment actions that were not part of a continuing violation in *Stolzenburg v. Ford Motor Co.*, 143 F.3d 402 (8th Cir. 1998). As a result, each non-promotion that occurred more than 300 days before the filing of an EEOC complaint was time-barred. "In order to establish a continuing violation . . . , a plaintiff must show that the acts of which he or she complains were not actionable

as discrete violations of the applicable law. *Id.* at 405 (citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)). *See also Bullington*, 186 F.3d at 1311 (non-promotion two years earlier put plaintiff on notice that unlawful conduct had occurred, precluding use of a continuing violation theory to save her stale claims).

The Second Circuit followed the same approach in refusing to treat the denial of a pay raise, alleged demotion and termination as part of a continuing violation in *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898 (2d Cir. 1997), *cert. denied*, 528 U.S. 817 (1999). The court reasoned: "[c]ompleted acts such as a termination through discharge or resignation, a job transfer, or discontinuance of a particular job assignment, are not acts of a 'continuing' nature." *Id.* at 907 (internal quotation and citation omitted).

Unlike harassment cases, where the conduct may continue over a period of time before it becomes severe or pervasive enough to create a hostile work environment, *see Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), a discrete employment action is actionable on its own. It does not require subsequent events to alert an individual that his rights may have been violated. Thus, an individual will know at the time the discrete employment action occurs whether he thinks he has experienced discrimination. If he thinks he has a claim, Title VII requires him to file a charge with the EEOC within 180 or 300 days of the event, depending on whether a state or local enforcement agency exists. 42 U.S.C. § 2000e-5(e). Otherwise, his claims are time-barred.

II. ALLOWING THE NINTH CIRCUIT'S DECISION TO STAND WOULD SEVERELY PREJUDICE EMPLOYERS BY LIMITING THEIR ABILITY TO DEFEND STALE EMPLOYMENT ACTIONS AND WOULD THWART TITLE VII'S GOAL OF AVOIDING DISCRIMINATION

A. Allowing Aggrieved Individuals To File EEOC Charges Outside the Limitations Period on Discrete Employment Actions Would Conflict With the EEOC's Record-keeping Requirements Under Title VII and Would Impose an Undue Burden on Employers To Defend Against Stale Claims

Employers need to operate without the constant pressure that flows from the uncertainty over whether they will have to defend past employment decisions against challenges in the distant future. The EEOC recognized this need when it set the retention period for employers to keep certain personnel and employment records under Title VII at one year from the date the record is made or the personnel action involved occurs, whichever is later, unless a charge has been filed. 29 C.F.R. § 1602.14. These records generally relate to discrete employment actions, like hiring, promotions and terminations.

The one-year retention period means employers will not destroy relevant documents as part of routine file maintenance before an individual has had the opportunity to file a charge of discrimination with the EEOC. Since Title VII gives some aggrieved individuals up to 300 days from the date of the allegedly discriminatory event to file such a charge, an employer will know whether a particular employment action is the subject of a charge before it destroys any relevant documents.

Interpreting the continuing violation theory broadly as the Ninth Circuit has done to expand the limitations period well beyond 300 days severely prejudices employers who reasonably have relied on the regulation lawfully to destroy relevant documents. The employer will not have any documents to support employment actions it took more than one year ago, which will hamper drastically its ability to defend itself against a subsequent discrimination claim.

For instance, allowing the decision below to stand would permit an employee who has applied and been rejected for ten promotions during the twenty years he has worked at a company to file suit under Title VII on all of them under a continuing violation theory, as long as the last rejection arose within the applicable limitations period. Under the Ninth Circuit's decision, even if the employee believed the first nine rejections were discriminatory when they occurred, the employee could have remained silent without sacrificing his claims. The employer would not have any inkling during the employee's career of his perception of discrimination, but it still would have to defend itself on each employment action many years after it occurred.

The decision below effectively would require employers to save all personnel and employment records forever, since they would not be able to anticipate which employment decisions would generate discrimination charges or when. This response, however, places an undue burden on the employer and is one the EEOC expressly rejected by limiting Title VII's recordkeeping requirements to one year, unless a charge has been filed.

In contrast, using the continuing violation theory to cover only a continuing course of conduct leading to an actionable harassment claim does not pose the same recordkeeping concerns, since harassment claims are unlikely to involve the type of personnel or employment records that the EEOC requires an employer to keep.

B. Title VII's Goal of Avoiding Discrimination, Which Led This Court To Recognize an Affirmative Defense to Sexual Harassment Claims Under Certain Circumstances, Supports Setting a Reasonable Person Standard To Establish When Conduct Is Part of a Continuing Violation

This Court balanced the competing interests of complainants and employers when it developed an affirmative defense to harassment claims under certain circumstances in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Where the employer has not taken any tangible employment action, it may raise an affirmative defense to liability and damages for harassment by a supervisor by showing two things: (1) that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior and (2) that the alleged victim unreasonably failed to take advantage of any of the preventive or corrective measures the employer provided or to avoid harm otherwise. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

The Court explained in *Faragher* that holding an individual to a reasonable care standard stems from the general theory of damages, which requires a victim to use reasonable means to avoid or minimize harm. The underlying premise of the affirmative defense is that an employer should not be responsible for harm the individual could have avoided. "If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no

award against a liable employer should reward a plaintiff for what her own efforts could have avoided." *Id.* at 807.[6]

In *Faragher*, this Court went on to describe Title VII's "'primary objective' . . . [as] not to provide redress but to avoid harm." 524 U.S. at 806. The affirmative defense accomplishes this objective by encouraging employers to develop, and individuals to use, effective complaint procedures.

> Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, and the EEOC's policy of encouraging the development of grievance procedures. To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose. As we have observed, Title VII borrows from tort law the avoidable consequences doctrine, and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances.

Ellerth, 524 U.S. at 764 (citations omitted).

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[6] Several courts of appeals have upheld the availability of the affirmative defense based on the unreasonableness of the employee's inaction in response to the alleged harassment. *See, e.g., Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001) (refusing to excuse a plaintiff's failure to complain about alleged harassment based on a speculative fear of retaliation as unreasonable); *Parkins v. Civil Constructors, Inc.*, 163 F.3d 1027, 1038 (7th Cir. 1998) ("'the law against sexual harassment is not self-enforcing' and an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists") (citation omitted).

The same considerations support establishing a "reasonable person" standard for determining when conduct is part of a continuing violation. A victim of discrimination who is aware of his rights, but fails to file a timely EEOC charge, knowingly allows a discriminatory situation to continue, frustrating Title VII. Requiring timely EEOC charges avoids harm by maximizing an employer's opportunity to learn of the alleged discrimination and to correct it promptly. Many instances may arise where employers, particularly large ones such as members of EEAC and the Chamber, are unaware of potentially discriminatory conduct occurring in the workplace. In these situations, they must rely on their employees to report any potential discrimination. Even if the conduct does not rise to the level of actionable discrimination, it still may disrupt the workplace and require attention. The sooner the employer learns of the potential discrimination, the sooner it can address it.

Prompt action clearly benefits the victim of alleged discrimination—"bringing of the suit is almost certain to stop the harassment, so that unlike certain cases of nuisance the plaintiff will not be put to the expense of bringing successive suits. What is more, she can always seek injunctive relief against a continuation of the unlawful conduct." *Galloway*, 78 F.3d at 1167 (citations omitted).

In fact, an early resolution of the situation also helps the workforce and the employer. "Reporting the harasser benefits the victim by allowing the company to halt future harassment. It benefits others who might be harassed by the same individual, and it benefits the company by alerting it to the disruptive and unlawful misconduct of an employee. Thus, the reporting requirement serves the primary objective of Title VII which is not to provide redress but to avoid harm." *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001) (internal quotations and citation omitted).

The Ninth Circuit's decision to allow individuals who knowingly delay reporting discrimination to revive stale claims would subject individuals to more discrimination, not less, undermining the primary goal of Title VII. *See Barrett*, 240 F.3d at 267. The Seventh Circuit's approach, in contrast, respects fully the delicate balance Congress struck in enacting Title VII among an individual's interest in asserting a civil rights violation, an employer's interest in not defending stale claims, and the public's interest in promptly ending discriminatory practices.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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